BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

FRANCES R. DAVENPORT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,647
MARCON OF KANSAS	)	
Respondent	)	
AND	)	
	)	
WESTERN AGRICULTURAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER ON REMAND

On March 6, 2015, the Kansas Court of Appeals reversed and remanded the Appeals Board's May 30, 2014, Order with directions to review the ALJ's decision solely in the modification claim, Docket No. 1,034,647, and to consider claimant's counsel's claim for attorney fees at that time. The Court of Appeals ruled the Board had no jurisdiction to review the Award in Docket No. 1,043,900.

APPEARANCES

Paul D. Post, of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and Western Agricultural Insurance Co. (respondent)

RECORD AND STIPULATIONS

The Board has adopted the stipulations listed in the December 30, 2013, Award. The Board has considered the record contained in said Award, with the exception of the depositions of Bud Langston and Stephen Reintjes, M.D., which were taken in Docket No. 1,043,900 only.

ISSUES

Respondent argues, based on the record the Board has considered upon remand, claimant has not sustained her burden of proving she suffered any additional permanent impairment resulting from the original injury of June 10, 2005. Respondent also argues claimant failed to establish the need for future medical treatment necessary to cure or

relieve the effects of the June 10, 2005, accidental injury. Finally, respondent argues the Board cannot consider claimant's motion for post-award attorney fees as the evidence claimant now presents to the Board was not a part of the record before the ALJ.

Claimant requests the Board find she is entitled to review and modification of the original award and determine the amount of compensation due under the application for review. Claimant also requests the Board consider prior motions for attorney fees and allow claimant's attorney to file a new motion for attorney fees if appropriate.

The issues are:

1. Is claimant entitled to review and modification of the Award entered in 2008, which involved an injury on June 10, 2005?

2. What is the nature and extent of claimant's injuries and disability?

3. Is claimant entitled to future medical benefits and/or unauthorized medical compensation?

4. Does the Board, at this time, have jurisdiction to determine the request for an award of attorney fees to claimant's counsel under K.S.A. 44-536?

FINDINGS OF FACT

At the time of the original April 10, 2008, regular hearing in this matter, claimant had been working for respondent for 10 years. Claimant's job was making and baking pies to be sold in restaurants and grocery stores. Respondent employees baked pies four days a week, with Fridays spent cleaning ovens. Claimant testified that, on a normal day, 500 to 600 pies were made.

On June 10, 2005, while cleaning ovens, claimant was in a seated position in front of an oven, replacing rails, when she felt a sharp pain in her low back that ran down her legs. This sharp pain made it difficult for her to move, but she managed to make her way to the restroom. Due to a significant amount of pain, claimant was unable to leave the restroom. She hollered for help and her husband, who also works for respondent, and her boss came and helped her to her vehicle, giving her ice for her back. After several hours of radiating pain, claimant was able to move around.

On Monday, June 13, 2005, claimant went to see David Hodgson, M.D., her primary care physician. She testified her pain would increase if she was not careful with activity. She also could not sit for too long, and she would stretch out flat on her bed or the floor when her low back pain was bad. Physical therapy helped alleviate some of the pain.

Claimant was provided with job modifications after the June 10, 2005, accident. She

was assigned an assistant to do most of the carrying and bending, was given a chair to use at any time and she could take breaks when needed. At the time of the 2008 regular hearing, claimant continued to work the same number of hours at the same rate of pay. She worked some overtime, depending on how much there was to do and if she had help. Claimant sometimes worked 10-12 hours a day. Claimant worked full-time until March 2011. Claimant began receiving Social Security disability in March 2011 and Medicare on August 1, 2013.

Claimant testified that staying mobile helped her physically. Her supervisor wanted her to take on more of a supervisory role and do less physical work, but she was not able to do so because of fluctuations in the workforce of the company. Claimant did not miss any work because of the June 10, 2005, accident.

At the request of respondent, claimant initially met with William T. Jones, M.D., an orthopedic physician, on September 13, 2005, for evaluation of pain in her back and left lower extremity. Dr. Jones sent claimant for physical therapy, prescribed pain medication and ordered x-rays and an MRI. Dr. Jones opined claimant's June 2005 work incident had aggravated preexisting degenerative disk disease, osteoarthritis and degenerative spinal stenosis of her lumbar spine. He recommended anti-inflammatory medication and to apply moist heat. Claimant was to minimize flexion and twisting motions of the spine. Claimant reported no history of back pain. Dr. Jones recommended claimant work no more than 10 hours a day.

In March 2006, Dr. Jones again recommended physical therapy. On July 11, 2006, Dr. Jones recommended a CT myelogram. On August 22, 2006, claimant was referred for pain management with Steven Peloquin, M.D., who provided claimant with multiple epidural steroid injections. Because claimant received no long-lasting relief from the injections, Dr. Jones determined claimant had more than just inflammatory pain.

Dr. Jones did not meet with claimant again until February 20, 2007, at which time he found her to be at maximum medical improvement (MMI). He suggested claimant continue working with restrictions, or move into a different job that required less bending, twisting and lifting. If those options were not available he recommended claimant discontinue working altogether.

Dr. Jones, in a letter dated March 5, 2007,[1] opined claimant sustained an aggravation of preexisting degenerative disk disease, osteoarthritis and degenerative spinal stenosis of the lumbosacral spine as a result of a work-related injury. Dr. Jones noted claimant continued to work full-time despite almost daily pain, particularly with repetitive bending, twisting, and lifting. He opined the repetitive nature of claimant's movements in her job perpetuated her symptoms. Dr. Jones felt claimant had three

[1] Jones Depo., Ex. 1.

options: terminate work altogether; continue working in her current capacity while enduring the pain; and finally being reassigned within the company to a job that required less bending, lifting and twisting. It was Dr. Jones' impression that claimant had almost reached her limit with respect to the endurance of daily pain. He felt it important to keep claimant in the workforce, preferably in another position within the company, which would limit her to occasional bending, lifting and twisting. He indicated claimant's pain and symptoms would likely increase if she continued to bend at the waist during her employment.

On March 26, 2007, Dr. Jones, in a letter to Cindy Carley, a Farm Bureau Claims Supervisor,[2] stated it was his impression that claimant sustained a work-related aggravation of a preexisting problem with respect to her lumbosacral spine and that she was at MMI, as of March 5, 2007. He assigned claimant an 8 percent whole person functional impairment, under the Spinal Injury Model of the *Guides*.[3] Dr. Jones opined that this 8 percent preexisted the June 10, 2005, date of accident.

Dr. Jones testified he did not use the range of motion model because he did not feel it was very accurate. He acknowledged that if he had used the DRE method, claimant would have a 5 percent impairment under DRE Lumbosacral Category II. However, if claimant had been found to have non-verifiable radiculopathy, she would be entitled to a 10 percent impairment. Finally, Dr. Jones testified if claimant were to require surgery at some point, it would be a decompressive procedure at three levels.

Claimant met with board certified disability evaluating physician, Peter V. Bieri, M.D., for an evaluation on August 23, 2007, at the request of her attorney. Claimant presented with complaints of low back pain radiating into her left lower extremity from an injury which occurred in the course of her employment on June 10, 2005. Dr. Bieri noted an August 19, 2005, MRI showed results consistent with marked stenosis at L4-5 and L5-S1 and lesser findings at L3-4. Claimant also had a nerve conduction study on October 27, 2005, that was essentially normal. A CT myelogram on July 24, 2006, was consistent with the MRI findings. Dr. Bieri noted claimant continued to work with no formal restrictions and within her pain tolerance.

Dr. Bieri opined claimant suffered from a lumbar strain and clinical left lower extremity radiculopathy from the work-related injury which incurred on June 10, 2005. Dr. Bieri found claimant had experienced a loss of range of motion, which he attributed to the June 10, 2005, accident. He could not say if claimant's continued working would further affect her range of motion. He did not find atrophy, weakness or sensory loss. Claimant did have a subjective decrease in sensation along the lateral aspect of her entire left lower

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[2] *Id.*, Ex. 2.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

extremity, to the toes, and a slight decrease in reflexes on the right. He found claimant to be at MMI and assigned a 10 percent whole person impairment, based on DRE Lumbosacral Category III of the *Guides*.

Because claimant has continued under active care in the form of prescription and over-the-counter medication, Dr. Bieri did not anticipate claimant would need future specific treatment, but opined she may eventually be a surgical candidate.

Claimant alleged a new injury on September 22, 2008, when bending, lifting and other activities caused additional injury to her low back. Claimant baked with two sets of ovens, one high and one low. She was placing pies in the lower oven when she experienced an onset of low back pain. Claimant was examined by Dr. Hodgson on September 22, 2008, complaining of additional back pain with pain, weakness and burning into her left leg, with indications the symptoms were trying to move into her right leg.

Claimant testified the accident happened because she was not careful enough and she moved or lifted or twisted wrong.[4] The more bending and reaching she did, the more she hurt. She testified she leaned against walls and tables to keep her back straightened and for safety and support. Claimant couldn't recall when she started using walls and tables to keep from falling, although, it was sometime after the September 22, 2008, accident.[5] She did not realize how often she was doing it until her coworkers started asking if she was feeling bad and did she need to sit down.

Claimant met with physical medicine and rehabilitation specialist, Terrence Pratt, M.D., for a court-ordered independent medical examination (IME) on September 10, 2009. Claimant presented with a chief complaint of low back pain. She reported initial symptoms in 2005, while cleaning ovens. In 2008, claimant turned wrong in the course of her employment and her symptoms increased. Dr. Pratt wrote that claimant reported her current symptoms were dependent on ambulation, working and bending. Claimant reported pins and needles sensations in her left lower extremity and in her right lower extremity from her knee to her foot. Her symptoms were exacerbated when she rolled over, which would cause her left leg to feel like it was on fire, and with prolonged sitting, over thirty minutes.

Dr. Pratt wrote claimant had some improvement in her 2005 symptoms from injections she received, but the symptoms slowly returned. Claimant reported that her lower extremity symptoms developed in 2008, and in general her symptoms increased since the most recent event, but not significantly. Claimant's pain diagram had her pain at a 4 to 9 out of 10. She described deep aching in her central low back, with pins and

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[4] R.H. Trans. (Sept. 5, 2013) at 14.

[5] *Id.* at 18.

needles sensation involving her right leg and foot, deep aching and stabbing in her left thigh with pins and needles sensation, burning in her left leg and pins and needles sensation in her left foot. Claimant continued to perform her full-time work duties.

Dr. Pratt diagnosed chronic low back pain with multilevel degenerative disc disease and spinal stenosis. He noted claimant's persistent symptoms since 2005, with specific documentation of symptoms in 2006 with therapeutic intervention, documentation of chronic involvement of her lumbosacral region by her primary care physician in 2007 and reported bilateral lower extremity symptoms before the 2008 slight aggravation of her symptoms. He felt claimant's symptoms are the probable consequence of her work-related injury on June 10, 2005, with multilevel degenerative changes and spinal stenosis preexisting September 22, 2008, and June 10, 2005. No medical records show claimant had any low back complaints of a serious nature prior to June 10, 2005.

Dr. Pratt acknowledged the EMG studies from October 27, 2005, reflected a normal study, with claimant displaying normal reflexes without atrophy on June 10, 2005. Additionally, claimant displayed no right leg complaints in 2005. At the April 10, 2008, hearing, claimant failed to express complaints of weakness in her legs. Dr. Pratt agreed the September 22, 2008, report from Dr. Hodgson indicated weakness in both claimant's legs. Dr. Pratt acknowledged there were no medically documented right leg complaints before March 5, 2007, when claimant was found to be at MMI for the 2005 injury.

Dr. Pratt opined claimant had preexisting degenerative changes that were present prior to the 2005 and 2008 events, and basically she had an aggravation of the underlying involvement. He testified that the aggravation occurred in 2005 and was reported as vocationally related. Claimant continued to have symptoms after that and developed more symptoms before the September 2008 accident.

Dr. Pratt indicated claimant's aggravation was not the result of a single traumatic accident, but rather a continuous and repetitive trauma from work activities performed since March 5, 2007, when claimant was released at MMI. His understanding was claimant had aggravations prior to and after September 22, 2008. Dr. Pratt indicated that the accident in 2008 led to an increase of claimant's symptoms. He also indicated there can be an increase in degenerative disease with a sedentary lifestyle as well as with an active lifestyle, but someone doing heavy activities is more likely to have more problems.

Claimant was asked to consider additional injections and a surgical reevaluation should the injections fail. Dr. Pratt felt claimant should temporarily avoid frequent low back bending and twisting. Although Dr. Pratt was not asked by the ALJ to address permanency, he testified that he had no reason to disagree with Dr. Bieri's opinion of a 10 percent impairment to the body as a whole. He felt claimant's impairment had increased. But, he had no opinion as to the amount of the increase in impairment. He testified that the event in 2008 was the least significant in terms of claimant's increased symptoms.

Claimant met with Dr. Bieri for an additional evaluation on February 15, 2010, at the request of her attorney. Dr. Bieri issued another report in which he noted claimant's symptoms were worse, primarily with increased pain in the low back and with radiating pain into both lower extremities. He noted claimant had increased difficulty with any lifting, bending or twisting, as well as with sitting and driving. Dr. Bieri's examination revealed moderate low back pain and tenderness to palpation, radiating into both hips. Dr. Bieri noted that in 2007, claimant only complained of pain in the left lower extremity and left hip. He noted a decrease in range of motion of the lower extremities in 2010, and sensory deficits in both lower extremities in 2010, whereas, in 2007, there was only a slight decrease in the left.

Dr. Bieri noted claimant reported additional injury during active employment, possibly in September 2007 and September 2008, thus aggravating the preexisting condition of claimant's lumbar spine region from 2005. He continued to believe pain management was an appropriate treatment option for claimant and believed the need for more formal pain management was the direct result of the second injury. He utilized the Range of Motion model in the *Guides*, and determined claimant had an additional 5 percent whole person impairment attributable to the most recent injury.

Dr. Bieri opined claimant was symptomatic from the time of the previous injury on the occasion of his August 23, 2007, evaluation. He could not say when the increase in pain started. His rating was based primarily on the difference between the range of motion recorded at the time of the first evaluation and the range of motion at the time of the latest evaluation. Claimant was symptomatic in the same area and had increased symptoms.

In March 2011, claimant reduced her work to 20 hours per week because of back pain going down into her left leg. Claimant testified that she had been doing real good and wasn't having too many problems until she reinjured her back. Claimant testified that her pain level depends on her daily activity. As of the hearings on September 5, 2013, claimant was only working 15 hours a week. Claimant would meet with Dr. Hodgson three times a year for medication management.

Claimant met with Dick Santner on June 9, 2011, for a vocational assessment, at the request of her attorney. Mr. Santner noted claimant injured her low back and received treatment, most of which was not very helpful long term.

Mr. Santner identified 17 tasks claimant has performed over the last 15 years, and determined she has continued to work for respondent part-time, earning $9.65 per hour and working 15-18 hours a week. He noted claimant had help with the heavier work activities. He testified a person would have to be a much more accomplished baker to work for respondent than to work at Daylight Donuts.

In a letter from claimant's attorney, dated April 2, 2013, Dr. Bieri was asked to review the revised task list of Dick Santner to determine claimant's task loss. Dr. Bieri

opined claimant has a 29 percent task loss, having lost the ability to perform 5 out of 17 tasks.

Dr. Bieri testified he did not assign restrictions in 2007 or 2010, instead utilizing documentation from Dr. Pratt for restrictions and how those relate to the tasks. The restrictions he used to formulate his task loss opinion are those attributable to the injuries after 2007. He testified, had he been asked to assign restrictions, he would have placed claimant in the medium physical demand level, which would limit occasional lifting to 50 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds of constant lifting. Those restrictions take into consideration claimant's low back impairment.

Dr. Bieri indicated that if there were tasks claimant avoided by self-limiting due to symptoms, then those are tasks that she should be restricted from performing. However, he also indicated that a simple complaint of pain doesn't preclude certain activity. Additional injury consistent with increased pain would suggest that certain activity should not be performed.

A Review and Modification hearing was held on September 5, 2013, in relation to the Award entered on July 14, 2008, for Docket No. 1,034,647. The Award was for a 9 percent whole body impairment to the lumbar spine. Claimant was asking for modification of that Award due to an increase in symptoms related to the September 22, 2008, accident. The direct examination testimony of claimant contained in the regular hearing transcript in Docket No. 1,043,900, taken earlier the same day, was incorporated into the Review and Modification record. However, the cross-examinations in each docketed transcript relate to only that docketed injury claim. The exhibits from the Docket No. 1,043,900 regular hearing transcript were not included in the record in Docket No. 1,034,647.

Claimant testified her boss had tried to transition her into a supervisory role, but she did not see herself as a supervisor. Instead, she had to cut down on the amount of work she was doing and no longer worked overtime. Claimant began working three days a week with Wednesdays off and, after the 2008 incident, respondent again assigned an assistant to help her with the lifting and bending.

Claimant testified that her back condition has slowed her down because she has to be more careful. She does not want to get hurt again and make her condition worse. She is able to bend down, but has to have something to help her stand. She no longer lifts or carries anything heavy. She testified if she sits just right, the pain in her low back will shoot down her left leg and require she change position. Claimant testified that in 2008 she began to notice numbness and tingling in her right leg from her toes to her knee.

Claimant has been receiving pain medication in the form of Tramadol, from Dr. Hodgson. Claimant tries to take no more than two pills a day. She also takes two Tylenol PM when she goes to bed as it helps her with the pain so she can sleep. She testified

there have been a few times where she has taken up to six pills in a day for the pain, but that is rare.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2005 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, *et seq*.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

Claimant suffered an injury which arose out of and in the course of her employment with respondent on June 10, 2005. Claimant underwent substantial medical treatment for that injury, but missed no work, continuing to perform her regular duties. However, claimant was provided accommodation in the form of a co-worker 's help with carrying and lifting. Claimant's work hours did not change, including some 10-12 hour days.

Dr. Pratt stated that claimant suffered an aggravation of her low back and left leg problems from her work activities since March 5, 2007, when claimant was found to be at MMI from the 2005 injuries. He specifically identified increased aggravation on September 22, 2008, from her work with respondent. He also noted the involvement of the right lower extremity with claimant's more recent complaints, something not present with the 2005 accident. This calls into question Dr. Pratt's determination that all of claimant's

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

symptoms predated the 2008 accident.

Dr. Bieri had the opportunity to examine claimant over a several year period, both before and after the alleged accident in September 2008. He noted increased pain from 2007 to 2010, with a decrease in claimant's range of motion during the later examination. Claimant's tenderness was present bilaterally in 2010, whereas, in 2007, it was limited to the left hip. Dr. Bieri opined claimant had suffered additional injuries resulting in increased permanent impairment from the later injuries.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7] However, the rule in *Jackson*[8] is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury.[9]

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[10]

In workers compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[11]

K.S.A. 44-528(a)(d) (Furse 2000) states:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and

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[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

[10] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[11] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

> if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Claimant requests review and modification of the original Award from the June 10, 2005, accident. It is claimant's burden to prove her current condition stems from the 2005 accident and is not the result of the later 2008 accident.[12]

While there is medical evidence indicating a connection between claimant's more recent injuries and disability and the 2005 accident, the more persuasive evidence indicates claimant suffered additional trauma, including a specific accident on September 22, 2008, while working for respondent. The medical opinions of Dr. Bieri convince the Board that claimant's current conditions and need for ongoing medical treatment stem from her work activities after the 2005 accident, and specifically from the accident on September 22, 2008.

Claimant's request for the review and modification of the Award in Docket No. 1,034,647, is denied. Claimant's condition worsened and is the result of injuries suffered after June 10, 2005, and more particularly on September 22, 2008.

K.S.A. 44-536 (Furse 2000) states:

> (a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases,

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[12] *Davis v. Haren & Laughlin Construction Co.*, 184 Kan. 820, 339 P.2d 41 (1959).

the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c and amendments thereto.

(b) All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. Every attorney, whether the disposition of the original claim is by agreement, settlement, award, judgment or otherwise, shall file the attorney contract with the director for review in accordance with this section. The director shall review each such contract and the fees claimed thereunder as provided in this section and shall approve such contract and fees only if both are in accordance with all provisions of this section. Any claims for attorney fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due. The director shall specifically and individually review each claim of an attorney for services rendered under the workers compensation act in each case of a settlement agreement under K.S.A. 44-521 and amendments thereto or a lump-sum payment under K.S.A. 44-531 and amendments thereto as to the reasonableness thereof. In reviewing the reasonableness of such claims for attorney fees, the director shall consider the other provisions of this section and the following:

(1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney; the employer shall attach to the settlement worksheet copies of any written offers of settlement which were sent to the employee before the employer was aware that the employee had hired an attorney;

(2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

(3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount of compensation involved and the results obtained;

(6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;

(7) the nature and length of the professional relationship with the employee or the employee's dependents; and

(8) the experience, reputation and ability of the attorney or attorneys performing the services.

(c) No attorney fees shall be charged with respect to compensation for medical expenses, except where an allowance is made for proposed or future treatment as a part of a compromise settlement. No attorney fees shall be charged with respect to vocational rehabilitation benefits.

(d) No attorney fees shall be charged in connection with any temporary total disability compensation unless the payment of such compensation in the proper amount is refused, or unless such compensation is terminated by the employer and

the payment of such compensation is obtained or reinstated by the efforts of the attorney, whether by agreement, settlement, award or judgment.

(e) With regard to any claim where there is no dispute as to any of the material issues prior to representation of the claimant or claimants by an attorney, or where the amount to be paid for compensation does not exceed the written offer made to the claimant or claimants by the employer prior to execution of a written contract between the employee and an attorney, the fees to any such attorney shall not exceed either the sum of $250 or a reasonable fee for the time actually spent by the attorney, as determined by the director, whichever is greater, exclusive of reasonable attorney fees for any representation by such attorney in reference to any necessary probate proceedings. With regard to any claim where the amount to be paid for compensation does exceed the written offer made prior to representation, fees for services rendered by an attorney shall not exceed the lesser of (1) a reasonable amount for such services; (2) an amount equal to the total of 50% of that portion of the amount of compensation recovered and paid, which is in excess of the amount of compensation offered to the employee by the employer prior to the execution of a written contract between the employee and the attorney; or (3) 25% of the total amount of compensation recovered and paid as described in subsection (a).

(f) All attorney fees for representation of an employee or the employee's dependents shall be only recoverable from compensation actually paid to such employee or dependents, except as specifically provided otherwise in subsection (g) and (h).

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

(h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and

> determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.
> (i) After reasonable notice and hearing before the administrative law judge, any attorney found to be in violation of any provision of this section shall be required to make restitution of any excess fees charged.

K.S.A. 2005 Supp. 44-555c(a) states:

> (a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge. The board shall be within the division of workers compensation of the department of labor and all budgeting, personnel, purchasing and related management functions of the board shall be administered under the supervision and direction of the secretary of labor. The board shall consist of five members who shall be appointed by the secretary in accordance with this section and who shall each serve for a term of four years, except as provided for the first members appointed to the board under subsection (f).

The Kansas Court of Appeals remanded to the Board the issues dealing with attorney fees both at the Board and ALJ levels and on appeal. Claimant's attorney's request for post-award attorney fees has been presented to the ALJ on two occasions. The ALJ initially declined to rule on the issue due to the lack of specifics contained in the attorney's affidavit to the ALJ and later, when the request was ruled premature. The Board's jurisdiction is limited to consider issues presented to and decided by the ALJ. As the ALJ has not made a determination regarding the request for post-award attorney fees, the matter is remanded to the ALJ for the initial determination on the attorney fee issues.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the December 13, 2013, Award of the ALJ should be reversed. Claimant has failed to prove her increased impairment and ongoing need for medical treatment is a natural and probable consequence of the June 10, 2005, accident. The record supports a finding that claimant's ongoing need for medical treatment stems from in intervening injury. This matter is remanded to the ALJ for a determination regarding the post-award attorney fee request.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders as it applies to Docket No. 1,034,647, dated

December 30, 2013, is reversed and the matter remanded to the ALJ for consideration of the request for attorney fees as set out above.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge